

provisioning of DSL-capable loops.”¹⁹³ Quite disingenuously, the witness contends that the tests Telcordia could perform were harmed “given the CLECs’ limited demand.”¹⁹⁴ Yet, as demonstrated above, CLEC demand has been directly and proximately constrained by SWBT’s refusal to execute an interconnection agreement that would enable CLECs to enter the market. SBC must not be allowed to keep CLECs from entering the market and then use a lack of market participation as an excuse for inadequate testing.

Telcordia’s report on DSL, unlike the other services tested, did not provide any statistical conclusions about the adequacy of SBC’s OSS to support xDSL capable loop orders. Instead, Telcordia merely stated that “there are processes and business rules in place by SWBT for ADSL.”¹⁹⁵ As this statement makes clear, the rules and practices verified by Telcordia were only for ADSL. “SWBT’s systems and procedures for processing xDSL-capable loops passed every test that could be conducted given the CLECs’ limited demand, leading to (sic) Telcordia to conclude that SWBT has processes and business rules in place *for ADSL*, . . . and that there were no outstanding issues relating *to ADSL*.”¹⁹⁶

For types of xDSL, SBC’s OSS lacks even the type of rules and procedures it has developed for ADSL. As Telcordia acknowledged, “Guidelines do not exist describing the ordering process for SDSL because SWBT does not offer this service.”¹⁹⁷ Similarly, SBC does not provide guidelines for other types of xDSL services.

¹⁹³ Chapman Affidavit ¶ 5.

¹⁹⁴ Chapman Affidavit ¶ 5

¹⁹⁵ Telcordia Report § 4.4.1.7 at 78 and § 4.6.2.5 at 101.

¹⁹⁶ Chapman ¶ 5 (emphasis added).

¹⁹⁷ Telcordia Report § 4.4.2.3.1 and § 4.4.2.2 at 79.

b. Testing Data Demonstrate SWBT's OSS Cannot Handle xDSL Orders

Even based on the extremely small number of xDSL orders reviewed, Telcordia's data demonstrates that SBC's OSS is ineffective for orders for xDSL-capable loops. Of the nine LSRs placed for ADSL, only two (22 percent) were successfully provisioned.¹⁹⁸ SBC's OSS had the same abysmal results for the SDSL orders placed over ISDN loops. Only two of the seven orders placed were successfully provisioned.¹⁹⁹

The seven denied ADSL loop orders were rejected for several reasons, including SBC's peculiar standards on length and speed of service.²⁰⁰ Rejections based on SWBT's criteria constitute an entry barrier for CLECs and underscore that SBC's OSS is *not* capable of providing nondiscriminatory, technologically neutral support for CLEC xDSL orders. In order to be nondiscriminatory, SBC's OSS must support order for loops meeting a variety of criteria for the range of xDSL services offered by CLECs.²⁰¹ The CLEC xDSL offering frequently extend service to customer served by loop lengths that vary from SBC's retail loop length cut-off. Similarly, CLEC xDSL offering are also offered at speeds that exceed SBC's retail DSL service.²⁰² In other words, because SBC's OSS is designed to reject xDSL loop orders that differ from those used in its retail DSL offering, the system is neither technologically neutral nor nondiscriminatory. Accordingly, SBC's OSS fails to meet the checklist requirements.

¹⁹⁸ Telcordia Report § 4.4.1.5.3 at 77.

¹⁹⁹ Telcordia Report § 4.4.2.4.3 at 79.

²⁰⁰ Telcordia Report § 4.4.1.5.3 at 77-78.

²⁰¹ Rhythms and other CLECs provide a variety of xDSL-based services that extend broadband capability to a wider customer base that served by SBC's retail ADSL offering.

²⁰² This Commission has expressly recognized that the technical characteristics such as loops length and equipment vary for different types of DSL technology. *UNE Remand Order* ¶¶ 427-28.

3. Telcordia's Review of SBC's OSS Was Not Sufficiently Independent

SWBT claims that Telcordia is an “independent” third-party participant in the OSS assessment process.²⁰³ Telcordia, however, is far from “independent” from SBC. Telcordia receives a substantial portion of its \$1.2 billion in revenues from SBC, on its of largest customers.²⁰⁴

Not only is Telcordia dependent on SBC for substantial revenue, but that revenue comes from the very type of OSS systems that Telcordia was asked to test for SWBT in Texas. For example, Telcordia provides SBC with LFACS, SBC's primary loop inventory and assignment system for outside plant, TIRKS, the system SBC uses to plan, inventory and assign circuit order control and circuit provisioning and SOAC, the system SBC uses to control the flow of services orders. SBC's new advanced services affiliate, Advanced Solutions, Inc., has already purchased at least one of Telcordia's OSS modules, TIRKS.²⁰⁵

All of these factors call into question the ability of Telcordia to be impartial in its testing of SBC's OSS. The business reality of Telcordia's relationship with SBC mandates that Telcordia's testing be viewed with suspicion and afforded little credibility. Because of the inadequacy of the OSS testing, including SBC's failure to use a truly independent and impartial third-party testor, SBC has failed to met its burden of proof for DSL services as set forth in the *BA-NY 271 Order*. SBC has neither presented “extensive commercial experience” nor persuasive third party testing that it “provides competing carriers with nondiscriminatory access

²⁰³ *SBC 271 Application* at 16, 85.

²⁰⁴ Hoover's Online, www.hoovers.com; company search: Telcordia

²⁰⁵ Statement of Lincoln Brown, Director-Regulatory for SBC Advanced Solutions, Inc. at CLEC meeting in San Francisco, California, January 18, 2000.

to the pre-ordering and ordering OSS function associated with the provision of xDSL loops, including access to loop qualification information and databases.²⁰⁶

III. SBC HAS NOT MET SECTION 271 REQUIREMENTS FOR CHECKLIST ITEM TWO FOR NONDISCRIMINATORY ACCESS TO LINE SHARING

Item 2 of the competitive checklist requires an applicant to demonstrate that it is providing “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).²⁰⁷ Although the list of unbundled network elements, which includes both line sharing and unbundled subloops, SBC’s application omits any demonstration of compliance with this checklist item and cannot, for that reason alone, be granted.²⁰⁸

On December 9, 1999 more than one month before SBC filed its application, the Commission released its *Line Sharing Order*, which requires all ILECs, including SBC, to provide CLECs with access to the high-frequency portion of a POTS loop for provision of xDSL service. The *Line Sharing Order* was published in the Federal Register on January 10, 2000.²⁰⁹ Thus, the rules on line sharing will take effect 30 days thereafter on February 9, 2000. In its order, the Commission specifically urged ILECs to provide line sharing as soon as possible after the effective date, but no later than 120 days or early June. SBC’s 271 application includes no discussion of the manner in which it intends to comply with the Commission’s *Line Sharing Order*.

The *Line Sharing Order* will become effective while SWBC’s application is pending. Therefore, it is reasonable to require SBC to document how it will meet its obligations on or

²⁰⁶ BA-NY 271 Order ¶ 335.

²⁰⁷ 47 U.S. C. § 251(c)(2)(B)(ii).

²⁰⁸ Independent of Section 271, SBC agreed to make UNEs available as a condition of approval of its merger with Ameritech. *SBC/Ameritech Merger Order* ¶ 394.

²⁰⁹ 65 Fed. Reg. 1331-1346 (Jan. 10, 2000).

before the Commission deadline. SBC is already utilizing line sharing in its retail ADSL offering. Its line sharing arrangements are now being transitioned to SBC's advanced services affiliate, ASI, pursuant to the Merger Conditions. SBC has refused to include line sharing provisions in current interconnection agreements for CLECs and the interconnection agreement SBC has executed with ASI does not specify the rates, terms or conditions under which line sharing will occur. To permit SBC to transition its line sharing arrangements to ASI without providing nondiscriminatory access to CLECs will only increase the disadvantage to CLECs, who need to begin detailed technical and financial planning for utilizing line sharing arrangements. The Commission must not grant SBC's application in the absence of a concrete and detailed showing of how SBC will satisfy its obligation to provide nondiscriminatory access to the line sharing UNE.

IV. SBC HAS NOT MET SECTION 271 REQUIREMENTS FOR CHECKLIST ITEM FOUR FOR UNBUNDLED LOOPS

Item four of the competitive checklist requires SWBT to offer "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."²¹⁰ To demonstrate compliance with checklist item 4, SBC must demonstrate "that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality . . . [and it] must also demonstrate that it provides nondiscriminatory access to unbundled loops."²¹¹ Since the Commission's *Local Competition Order* adopted in August 1996, the definition of "local

²¹⁰ 47 U.S.C. § 271(c)(2)(B)(iv).

²¹¹ *BA-NY 271 Order* ¶ 269; *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121 (rel. Oct. 13, 1998) 13 FCC Rcd 20599, 20637 ¶¶ 184-187.

loops” has included loops capable of supporting xDSL technologies.²¹² The Commission’s *Advanced Services Order* echoed this requirement.²¹³ The obligation of ILECs to provide DSL-capable loops was reiterated and clarified in the *UNE Remand Order*, where the Commission stated “[w]e now clarify that we require the incumbent to provide loops with all their capabilities intact, that is, to provide conditioned loops, *wherever* a competitor requests, even if the incumbent is not itself offering xDSL to the end-user customer on that loop.”²¹⁴

Recently, the Commission stated that it intends to scrutinize all future 271 applications for compliance with this requirement. “Given our statutory obligation to encourage deployment of advanced services and the critical importance of provisioning of xDSL loops to the development of advanced services marketplace, we emphasize our intention to examine this issue closely in the future.”²¹⁵ Thus, the Commission requires that SBC make “a separate and comprehensive showing” of nondiscriminatory provisions of xDSL capable loops.²¹⁶ This showing may be made either (1) through state-approved performance measures of actual extensive “commercial experience” or (2) “through proof of a fully operational separate advanced services affiliate” supported by “appropriate performance measures.”²¹⁷

For xDSL-capable loops SBC fails to make either such showing and therefore the Commission must find that it fails to meet the requirements of checklist item 4 to provide unbundled xDSL-capable loops. Its advanced services affiliate is not yet fully operational, and

²¹² *Local Competition Order* 11 FCC Rcd. at 15,181 ¶ 380.

²¹³ *Advanced Service Order* ¶ 52. “[T]o promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC DSL-capable loops on an unbundled and nondiscriminatory basis.” *Id.*

²¹⁴ *UNE Remand Order* ¶ 191.

²¹⁵ *BA-NY 271 Order* ¶ 330.

²¹⁶ *BA-NY 271 Order* ¶ 330 (emphasis added).

²¹⁷ *BA-NY 271 Order* ¶ 330 (emphasis added).

the record will not support a finding that xDSL loops are being provisioned on a nondiscriminatory basis.

A. SWBT Has Not Met Checklist Item Four Because it Cannot Demonstrate it Has a Legal Obligation to Provide xDSL Capable Loops

In Texas, there is not a single approved, enforceable interconnection agreement that provides terms and conditions under which a data CLEC can obtain the necessary unbundled elements to provision DSL Services.²¹⁸ Thus, data CLECs providing advanced services using xDSL technologies have no binding interconnection agreement that they can rely on to enforce SWBT's obligation to provide xDSL-capable loops or OSS pursuant to § 251(c)(3) and this Commission's orders. Thus, SBC cannot point to a single contract with xDSL terms and conditions that creates a "concrete and specific legal obligation to furnish the checklist items upon request."²¹⁹

The xDSL market in Texas will not begin to be open to competition until CLECs have § 251 interconnection agreements that provide unbundled network elements for the fundamental services and capabilities they need to compete. Contract language implementing the arbitration award will take effect until the Texas PUC has issued a final order and the order is no longer subject to reconsideration or appeal by SWBT. Sadly, given SBC's, these simple steps may take months, or years. Only after the Texas Arbitration Award is implemented in an Interconnection Agreement will it be possible to begin to collect evidence to establish whether SWBT has begun to open the xDSL market in Texas to competition. At this time, it is far too early to assess the adequacy of SBC's xDSL provisioning. Thus, SBC unless and until SWBT implements a Texas

²¹⁸ The contract with its affiliate ADI does not meet the requirement of a contract with an unaffiliated provider. Similarly, the T2A does not contain approved provisions for DSL-capable loops. Only after the Rhythms/Covad arbitrated agreements are approved and final will the T2A contain state commission approved terms and conditions for DSL.

²¹⁹ *Ameritech Michigan Order* ¶ 110; *BA-NY 271 Order* ¶ 52.

PUC-approved interconnection agreement that includes rates, terms and conditions for xDSL loops and OSS, the Commission must find that SBC has failed to meet the requirements of checklist item 4.

B. SWBT Has Not Proved That It Has A “Fully Operational” Advanced Services Affiliate

SWBT claims that its structurally separate advanced services affiliate, is “fully operational.”²²⁰ The Commission held that a BOC may submit appropriate performance measures as a part of its proof that it has a “fully operational separate advanced services affiliate.”²²¹ However, SBC has not yet completed the transition of its line sharing arrangements and other xDSL operations to ASI.²²² According to SWBT, ASI was not providing advanced services in Texas when the 271 application was filed, and will not begin to do so until February 2, 2000.²²³ Further, ASI will not use the same UNEs and associated ordering systems and procedures as its CLEC competitors until February 28, 2000.²²⁴ Thus, it seems tautological that SBC’s application is premature, because there is no “fully operational separate subsidiary, nor will there be in Texas until sometime after February 28, 2000.

Accordingly, SBC cannot demonstrate through performance measures or otherwise that there is no discrimination between a “fully operational” subsidiary and CLECs. Instead, SWBT, at best, offers *assurances* that it is *in the process of transitioning* its advanced services to ASI, while continuing to engage in unreasonable discrimination against nonaffiliated xDSL providers. For instance, while SWBT refuses to discuss line sharing with competitive DSL carriers, it

²²⁰ SBC 271 Application at 43.

²²¹ BA-NY 271 Order ¶ 330.

²²² SBC 271 Application at 44.

²²³ SBC 271 Application at 44.

²²⁴ SBC 271 Application at 44.

provides the line sharing UNE to its “separate” affiliate on terms and conditions that are not reflected in ASI’s approved interconnection agreement in Texas. Give the continuing pattern of discrimination, there is insufficient evidence to conclude that SWBT has a “fully operational” advanced services affiliate.

C. SWBT Has Failed To Demonstrate That There Are Any Meaningful xDSL Performance Standards in Texas

In the *BA-NY 271 Order*, the Commission committed to “examine carefully the performance standards adopted by the relevant state Commission.”²²⁵ The Commission emphasized its strong preferences that state-adopted standards be developed with input from the relevant carriers and that the standards include clearly-defined guidelines and methodology.²²⁶ Accordingly, the Commission enumerated, in considerable detail, the specific showings that the BOCs are expected to produce, supported by evidence of either extensive commercial experience or third-party testing.

D. SBC Has Not Presented Any Data of Compliance With xDSL Performance Measurements.

In Texas, only *two* out of the 131 performance measurements established in Texas specifically measure any aspect of the xDSL ordering or provisioning process.²²⁷ The two measure are inadequate. Not only do they fail to capture the scope of performance measures that

²²⁵ *BA-NY 271 Order* ¶ 333.

²²⁶ *BA-NY 271 Order* ¶ 334.

²²⁷ The development of performance benchmarks did not occur until the very end of the collaborative process in the Texas 271 proceeding. The two current benchmarks for xDSL services were considered “placeholders,” not comprehensive measures to evaluate SWBT’s performance for xDSL provisioning. All parties agreed and recognized that performance measurements for xDSL could not be established until the Texas PUC finalized the Arbitration Award. Indeed, the Texas PUC recognized the inadequacy of the two performance measures, and the importance of creating new and more detailed DSL-related benchmarks by requiring parties to the Arbitration Award to file proposed performance measurements after the Award is issued. *Texas Arbitration Award/Attachment 4* at 110.

must ultimately be adopted for xDSL, they also do not reflect the Texas PUC's decisions on performance measures from the Arbitration.²²⁸

For example, Performance Measurement 55.1 (installation interval) does not include the three day provisioning interval ordered by the Arbitration Award. Additionally, Performance Measurement 57 only measures response time to provide loop make-up information for ADSL; while the Arbitration Award establishes that such information must be provided, regardless of the type of DSL that Rhythms will deploy. Moreover, the existing performance measurements were not and could independently be reviewed or tested by Telcordia, since it only had nine data points when it prepared its Final Report. As a result, even if these two performance measurements could be considered valid, there was no accurate or reliable testing to determine whether SWBT was properly implementing or calculating the measurements. Further, the two performance measurements do not cover all of the service-affecting actions that SWBT must perform. For example, the current performance measurements for OSS-Pre-Order Interfaces (PM 1) has not been amended to reflect the requirements of the Award, yet pre-ordering and obtaining loop make-up information, as ordered in the Award, is critical to successful deployment of DSL services. Likewise, these performance measurements do not measure or consider the SWBT-implemented requirement that DSL CLECs supplement their orders. It is Rhythms' experience that most of its orders require at least one supplement, most of which are due to SWBT's changing requirements in the LSR process. If the use of supplements is part of the process, then that must be incorporated in a measure to determine the effect of those supplements. Finally, many of the Performance Measurements must now be disaggregated to specifically delineate measurement of DSL activities, such as OSS interface availability (PMs 1-

²²⁸ As discussed previously, the arbitrated xDSL provisions will ultimately become the terms and conditions applicable generally for xDSL in Texas.

2, 4), FOCs return (PM 5), Percent Rejects (PM 9), Order Process Flow Through (PM 13), installation completions (PM 56), missed due dates (PM 58), missed repair commitments (PM 66).²²⁹ Thus, even after the DSL-specific performance measurements are approved, they must be properly implemented. With absolutely no historical data on implementation of critical performance measurements on DSL, SBC cannot establish compliance with Section 271 requirements for xDSL capable loops.

Absent a comprehensive set of xDSL-specific performance measures the Commission cannot reasonably assess whether a BOC is meeting its obligations under the Act with respect to xDSL services. In effect, absent such measures, SBC intends this Commission to rely on promises of future performance, which the Commission has forcefully and repeatedly refused to do. The Commission should not approve SBC's application until SWBT has produced adequate performance measures showing, based on state-PUC developed xDSL-specific performance standards for nondiscriminatory compliance with the checklist. Given SWBT's past conduct, granting its application before the Texas PUC has implemented xDSL-related performance measurements and business rules would likely jeopardize the future of advanced services competition in Texas. It is unreasonable to assume that SBC will voluntarily and fully implement the Texas Arbitration Award or DSL-related performance measurements without real and continuous regulatory oversight. As described above, even with Texas PUC action at every step, SWBT still refuses to make reasonable terms, conditions, and rates available to Rhythms for xDSL services in Texas.

²²⁹ This list is not intended to be exhaustive. The detailed work of designing performance measurements that measure all aspects of the pre-ordering, ordering, provisioning, maintenance and repair, and OSS enhancements must be completed before the Commission can truly determine SWBT's success in implementing the checklist for advanced services providers.

E. SBC's xDSL-Specific Performance Data Are Insufficient to Meet the FCC's Requirement

SBC cannot demonstrate nondiscriminatory provisioning of xDSL loops on the basis of significant actual commercial experience. SBC attempts to rely on its overall “performance data” for all unbundled loops, despite the Commission’s admonition that it expects “a separate and comprehensive evidentiary showing” with respect to the provision of xDSL-capable loops.”²³⁰ SBC cannot and does not attempt to present any credible or significant data for the pre-ordering/ordering, provisioning, maintenance, and repair for xDSL loops. The Commission should therefore reject SBC’s attempt to meet the checklist through overall loop performance data that does not specifically address its performance on xDSL-capable loops.

Indeed, the only performance data presented for xDSL loops confirms that SWBT’s provisioning discriminates against data CLECs. As of the end of 1999, SWBT had provisioned only 960 loops for xDSL services in the entire state of Texas. Given the exceedingly low volume of xDSL loops provided to date, SWBT makes no effort to demonstrate nondiscriminatory provision of unbundled xDSL loops in the basis of its commercial experience. Instead, it cites Telcordia performance testing, together with several other factors, as demonstrating that it is meeting and will continue to meet CLECs’ demand for xDSL-capable loops.²³¹ However, neither the results of the limited third-party testing conducted by Telcordia nor the other factors cited by SWBT provide evidence of sufficient quality and quantity to demonstrate that SWBT is providing nondiscriminatory access to xDSL loops.

²³⁰ *BA-NY 271 Order* ¶ 330.

²³¹ *SBC 271 Application* at 39-40.

F. SWBT’s “Evidence” Concerning Its Recent Provisioning Has Not Been Independently Verified and Should Be Heavily Discounted

SBC also inappropriately relies on non-tested data to support its claims of nondiscriminatory xDSL loop provisioning. Telcordia tested only nine xDSL loop orders. Based on such limited data, Telcordia did not (and could not) reach any conclusion concerning SWBT’s compliance based on such limited data. Recognizing the need for additional data beyond that available to Telcordia, the Texas PUC requested DSL carriers, including Rhythms, to submit, on a confidential basis, data on actual orders for part of October and November. To Rhythms’ knowledge, these data have not been provided as a part of SBC’s application, despite the fact that they apparently form the basis for SWBT’s narrative concerning “recent provisioning.”²³²

Although SBC relies on these raw data to establish compliance with the Act, the Commission must not for several reasons. First, Rhythms’ raw data included only orders for *****CONFIDENTIAL ____ END CONFIDENTIAL***** loops. As with the limited data review by Telcordia, this small number of orders is unlikely to provide a statistically significant sample.²³³ Second, and perhaps more important, Rhythms was able to examine data from its loop orders and assist the Texas Commission in reconciling discrepancies only as to some of the data submitted.²³⁴ Apparently, SBC provided the Texas PUC Staff with additional raw data related to Rhythms *after* Rhythms and SBC filed jointly reconciled raw data. Rhythms was

²³² *SBC 271 Application* at 40-41.

²³³ See Texas PUC Open Meeting Transcript (Nov. 4, 1999) at 193-195, 212-213 (“Nov. Open Meeting Transcript/Attachment 19”)(appended as Attachment 19).

²³⁴ Reconciliation of any CLEC-specific data provided to the Commission is imperative. In going through the reconciliation process in Texas, Rhythms is aware that SBC’s raw data can initially look very different from Rhythms data because SBC imposes different business rules for measurement. It was not until the data was reviewed by Rhythms was the SBC data sufficiently changed to reflect actual practices. Rhythms has reason to believe that joint reconciliation must be done on all CLEC-specific data.

neither apprised that SBC was providing additional data to the Texas PUC, nor given an opportunity to review, confirm, or comment on the data.²³⁵

The data provided by SBC that did *not* comport with the jointly submitted data reconciled by both parties. For example, reconciled data shows a clear pattern of discrimination in SWBT's provision of loop qualification to data CLECs. In contrast, SWBT provided information that showed that SWBT provided loop qualification information to DSL carriers faster than it did to its own retail DSL service offering. Without an opportunity to review the SBC-provided data, Rhythms cannot verify its accuracy or completeness. The Commission should not rely on secret, unverified data as the basis for determining whether SBC is in compliance with the Act.²³⁶

Moreover, SBC's sweeping assertions concerning its recent performance on xDSL capable loops, such as its claim that it is offering "generally comparable" installation intervals for CLECs should be heavily discounted. Unlike the specific and detailed performance measures the Commission expects the BOCs to submit, phrases such as "generally comparable" appear to be SWBT's code words for discriminatory treatment. For instance, Rhythms' experience is that SWBT's OSS unfairly restricts the ability of CLECs to provision UNE loops quickly. For example, SWBT OSS systems automatically reject orders that ask for provisioning intervals

²³⁵ Rhythms only learned that additional data concerning Rhythms' xDSL loop orders had been provided to the Texas PUC when a reference was made to it during a Texas PUC open meeting. Nov. Open Meeting Transcript/Attachment 19 at 193-195. Rhythms registered its concerns about these data in a letter to Commissioner Pat Wood. Letter of Rhythms Links to Pat Wood, *Investigation Into Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Market; Operations Support Testing Commission Relating to The Investigation into Southwestern Bell Telephone Company's Entry in the InterLATA Telecommunications Market in Texas*, Docket Nos. 16251, 20000 (Oct. 21, 1999) (appended as Attachment 20).

²³⁶ See, e.g., *SBC 271 Application* at 40. Specifically, SBC stated that "the available data show general comparable installation timeliness." *Id.*

shorter than 12 business days.²³⁷ In contrast, under the worst circumstances, the installation interval for SWBT's retail DSL loops (that do not require conditioning) is nine days.²³⁸ Thus, SWBT's OSS, by rejecting CLEC orders automatically ensures that CLECs cannot even get the nine day interval that SWBT receives, and certainly nothing faster. Thus, under SWBT's view of "generally comparable" discrimination is the norm.²³⁹

V. ADVANCED SERVICES SHOULD BE A FOCAL POINT OF THE FCC'S 271 PUBLIC INTEREST INQUIRY

In addition to meeting the checklist requirements, SBC must also show that approval of its 271 application would serve the public interest:

[T]he public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected . . . Another factor that could be relevant to our analysis is whether we have sufficient assurances that markets will remain open after the grant of the application.²⁴⁰

SBC's entire public interest showing focuses on the long-distance market and the market for bundled local and long distance services.²⁴¹ The Commission must, however, consider the effect that grant of the application would have on the advanced services market. Indeed, the Commission has concluded that the state of competitiveness in the advanced services market

²³⁷ Supplemental Affidavit of Eric H. Geis On Behalf of Rhythms Links, Inc., In Response to the Commission's November 5, 1999 Memorandum, ¶ 21, submitted November 22, 1999 in conjunction with the Texas PUC's public interest examination of SBC's 271 application (appended as Attachment 21). Under the Texas Arbitration Award SBC must complete loop qualification for CLECs in 3-5 days and must provision loops in 5-7 days. *Id.* ¶ 21. Thus the maximum total provisioning period is 12 business days. Rather than recognizing this as a maximum interval, SBC instead treats this interval as a minimum. Lopez-Baros Aff/Attachment 1 ¶ 20. The minimum interval SWBT will accept on loop orders was recently was changed to 10 days. *Id.*

²³⁸ Chapman Affidavit ¶ 65. Indeed, SWBT's retail DSL customers may obtain installation intervals that are much shorter. *Id.* n.21.

²³⁹ See SBC 271 Application at 40.

²⁴⁰ BA-NY 271 Order ¶ 423.

significantly impacts the public interest, and that discrimination against DSL competitors frustrates the statutory objective of making advanced services available to all Americans.

“Given the importance to the public interest of continuing to ensure competition in the provision of advanced services, we are required by section 706 to be particularly vigilant.”²⁴²

Accordingly, the Commission’s public interest analysis, as it relates to the advanced services market, must include consideration of: (1) whether any other “relevant factors” exist that would “frustrate the congressional intent that markets be open;”²⁴³ and (2) whether there are “sufficient assurance that markets will remain open after grant of the application.”²⁴⁴ Evidence of anticompetitive or other improper conduct is highly relevant, as is evidence that there is insufficient competition to assure that the market will remain open after the application is granted. As explained in this section, SBC fails the public interest test on both counts.

Incredibly, data CLECs are operating in Texas without enforceable contracts that require SBC to provide DSL-capable loops. Thus, the limited DSL competition in Texas exists without binding interconnection agreements that CLECs can enforce to ensure they receive the full measure of rights due them under the Act and this Commission’s orders. Existence at the whim of the BOC, is particularly precarious given SBC’s unrivaled resistance to the market-opening provisions of the Act as they pertain to DSL services. Consequently, SBC’s assertions that the local market in Texas is irreversibly open for competition is incorrect, as it applies to DSL providers. As a direct result of SBC’s refusal to meet its statutory obligations, there is, in fact, very little DSL competition in Texas. SBC glosses over this significant fact by asserting that

²⁴¹ *SBC 271 Application* ¶ 47-62.

²⁴² *SBC/Ameritech Merger Order* ¶ 201.

²⁴³ *BA-NY 271 Order* ¶ 423.

²⁴⁴ *BA-NY 271 Order* ¶ 423.

there is viable competition in local markets in Texas, citing to the existence of 35 CLECs that have entered interconnection agreements.²⁴⁵ However, SBC omits the fact that only one of those CLECs — NorthPoint Communications — provides xDSL-based services.²⁴⁶ Furthermore, NorthPoint's interconnection agreement does not contain provisions relating to DSL.²⁴⁷ Data carriers without established relationships to SBC were unable to execute contracts to obtain the few UNEs necessary to provide DSL.

SBC's competition analysis flatly ignores the DSL market, where CLECs have a miniscule market share compared to SBC. By its own admission, SWBT had provisioned only 960 DSL loops for CLECs in the entire state by the end of 1999.²⁴⁸ By the end of January, 2000, Rhythms was providing xDSL services over only **BEGIN CONFIDENTIAL*** _____ ***END CONFIDENTIAL** loops, a tiny fraction of those 960 loops.²⁴⁹ Rhythms currently has **BEGIN CONFIDENTIAL*** _____ *** END CONFIDENTIAL** loop orders pending in Texas.²⁵⁰ Further, despite its claims, SBC's loop provisioning does not compare with Bell Atlantic-New York.²⁵¹

²⁴⁵ SBC 271 Application ¶ 6.

²⁴⁶ Lopez-Baros Aff/Attachment 1 ¶ 6.

²⁴⁷ Comments of NorthPoint Communications to The Public Utility Commission of Texas Southwestern Bell Operations Support Systems Interim Report, *Operations Support Testing Relating to the Investigation into Southwestern Bell Telephone Company's Entry Into the InterLATA Telecommunications Market In Texas*, Public Utility Commission of Texas, Project No. 2000 (Aug. 2, 1999) (appended as Attachment 22) at 2 n.2.

²⁴⁸ Chapman Affidavit ¶ 4.

²⁴⁹ Lopez-Baros Aff/Attachment 1 ¶ 6.

²⁵⁰ Lopez-Baros Aff/Attachment 1 ¶ 6.

²⁵¹ Although SBC claims that only 1,100 loops were provisioned for xDSL services in New York, that figure is inaccurate. SBC 271 Application at 39; Covad alone reported submitting loop orders for 2,300 xDSL-capable loops in New York. BA-NY 271 Order ¶ 320; Further, Bell Atlantic provisioned approximately 1,100 loops expressly designated as xDSL loops, but it also provisioned an additional 3,300 premium digital loops over which xDSL may have been provided. BA-NY 271 Order ¶¶ 320 n. 1012 - 321. Data is not available to indicate the number of premium loops over which xDSL services were provisioned. *Id.*

Completely overshadowing the number of xDSL loops provisioned for CLECs such as Rhythms, SBC announced in a press release that by the end of October 1999 it had sold 100,000 xDSL loops, one hundred times as many as sold by all CLECs combined.²⁵² Although SBC did not report the lines sold by state, SBC can reasonably and very conservatively be assumed to have sold at least one-seventh, or 14,000 of these xDSL lines in Texas. That figure is fifteen times larger than the number of xDSL lines sold by all CLECs in Texas. SBC declined to identify the number of xDSL loops it has provisioned for its retail operations in Texas, but in a press release issued in November 1999, SBC projected it would have an 80 percent market share for DSL services in its territory within three years.²⁵³ Any carrier possessing 80 percent market share for any service maintains significant market power. Tellingly, even for the markets for which SBC does provide data, it is clear that SBC still retains significant market power. For example, SBC states that it still retains 77 percent of business lines in Texas.²⁵⁴ SBC's market power is enhanced by its position as the monopoly provider of the facilities and services CLECs must have in order to compete. If SBC is allowed to enter long distance prior to demonstrating that local markets are irreversibly open to competition and that nondiscriminatory systems and policies are in place, SBC will leverage its monopoly control of local exchange facilities to become a monopoly provider of other services, including advanced services such as DSL.

By blocking the entry of competitors, and leveraging the advantage of being first into the DSL market, SBC has now established itself as the dominant provider of xDSL services in Texas. SBC has begun to boast that it will serve 80 percent of the customers in its service area,

²⁵² SBC Press Release, "SBC First to Surpass 100,000 DSL Subscribers, November 4, 1999, San Antonio, Texas, ("SBC Deployment Press Release/Attachment 23") (appended as Attachment 23) at 1.

²⁵³ SBC Deployment Press Release/Attachment 23 at 1.

²⁵⁴ *SBC 271 Application* at 9.

or an estimated 77 million people, with DSL service over the next three years.²⁵⁵ Thus, SBC appears to envision that it can lock up all but 20 percent of the DSL market across its service territory. A market share of 80 percent constitutes substantial market concentration by any measure, and demonstrates that competition from date CLECs is tenuous and no envisioned by SBC. Allowing SBC to enter long distance service now will put competition for DSL services at even greater risk.

In fact, evidence presented before the Texas PUC demonstrates that SBC has exploited its position as the incumbent LEC to deny xDSL competitors access to the “full functions and capabilities: of the local loop at an acceptable level of quality, contrary to this Commission’s stated policies.”²⁵⁶

Notwithstanding its obligations to provide access to all of a loop’s functions and capabilities and to deliver loops of acceptable quality, SWBT has exploited its position as the incumbent monopolist to restrict competitors’ access to full-feature, high-quality xDSL-capable loops. For example, SBC has set up its order entry system to screen for the technical parameters associated with its own type of ADSL.²⁵⁷ Rhythms and other CLECs are offering multiple types of xDSL technology, some of which can utilize much longer loops than the technology supported by SWBT. SBC’s use of an order entry system that fashion allows SWBT’s (or its ASI affiliate’s) orders o pass through the screen while rejecting Rhythms orders for “excess loop length” is patently discriminatory and anticompetitive.

Another example of SWBT’s artificial limitation on competitors flows from the way in which SWBT has configured its xDSL network equipment. SBC uses the Alcatel workstation to

²⁵⁵ SBC Deployment Press Release/Attachment 23 at 1.

²⁵⁶ *UNE Remand Decision* ¶ 167; *BA-NY 271 Order* ¶ 269.

²⁵⁷ *Lopez-Baros Aff/Attachment 1* ¶ 171.

provide xDSL.²⁵⁸ According to SWBT's own experts, the workstations are, to the some extent, rate adaptive. In other words, they can be set to operate at a range of speeds, such that interfering signals will cause the speed of transmission to decrease, but will not disconnect transmission altogether.²⁵⁹ However, SWBT chose not to utilize this "synching" ability of the workstation and instead set the performance parameters at a single bit rate.²⁶⁰ Thus, if any interference occurs that creates even a slight degradation in performance, the ADSL link will disconnect. SWBT then attempted to use this "fragility" of ADSL to justify its anticompetitive binder group management system. SWBT claimed that, because its ADSL service is fragile, it needs to be segregated into special binder groups reserved for that service alone.²⁶¹

SBC attempted to keep this information regarding the Alcatel workstation secret. Rhythms was eventually successful in getting the information declassified after the arbitration hearing.²⁶² This information makes clear the subtle, yet pervasive means SWBT has available to favor itself and disadvantage competitors. In addition, there are material and relevant documents in the sealed record of the arbitration that demonstrate a method by which SWBT is able to favor its own xDSL operations for assignment of loops, however, Rhythms cannot discuss any of the details because SBC has improperly asserted confidential status for the documentation, and Rhythms is precluded from disclosing the information.

²⁵⁸ Texas Arbitration, ACI Exh. 149, Vinyard Transcript at 101-114 ("Vinyard Tr./Attachment 24") (appended as Attachment 24). These pages of the transcript were declassified in the Texas PUC's Order No. 25 in the Texas Arbitration.

²⁵⁹ Vinyard Tr./Attachment 24 at 101-114.

²⁶⁰ Vinyard Tr./Attachment 24 at 101-114.

²⁶¹ *Texas Arbitration Award/Attachment 4* at 45 ("SWBT contends that BGM is necessary due to digital 'interference' which reduce the operating range of ADSL loops.")

²⁶² Texas Arbitration, Order No. 25 (Oct. 26, 1999) at 11.

VI. SBC HAS NOT MET THE ACT'S REQUIRED SHOWING OF SECTION 272 COMPLIANCE

Section 271(d)(3)(B) requires that, in addition to meeting the checklist and meeting the public interest standard, BOCs must demonstrate that they will be in compliance with Section 272 following approval of their 271 application. Section 272 contains structural, transactional, and nondiscrimination safeguards that BOCs must comply with for their interLATA services after receiving their 271 approval.²⁶³ Among the interLATA services covered by Section 272 are interLATA advanced services.²⁶⁴

The rationale for these 272 guidelines is to protect against misallocation of costs and cross-subsidization between the BOC and its 272 affiliate and to ensure that the BOC does not discriminate against its competitors by providing more favorable treatment to its own affiliate.²⁶⁵ The Section 272 safeguards play a critical role in minimizing the potential for negative market impacts. For this reason, the Commission has indicated that failure to comply fully with the provisions of § 272 is sufficient grounds for denial of a § 271 application.²⁶⁶ Further, the Commission has determined that “the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272” is “past and present behavior of the BOC applicant.”²⁶⁷ Commission has concluded that DSL services are both telecommunications services²⁶⁸ and jurisdictionally interstate.²⁶⁹ SBC may not offer DSL services, except through a

²⁶³ 47 U.S.C. § 272(d)(3)(B).

²⁶⁴ 47 U.S.C. § 272(a)(2)(B).

²⁶⁵ *BA-NY 271 Order* ¶ 401.

²⁶⁶ *BA-NY 271 Order* ¶ 402.

²⁶⁷ *BA-NY 271 Order* ¶ 402.

²⁶⁸ *Advanced Services Order* ¶ 35.

²⁶⁹ *GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, CC Docket No. 98-79, FCC 98-292, Memorandum Opinion and Order (rel. Oct. 30, 1998); *In the Matter of Bell Atlantic Telephone Cos. et al.*, CC Docket Nos. 98-168, 98-161, 98-167, 98-103, Memorandum Opinion and Order (rel. Nov 30, 1998).

separate affiliate meeting all of the Section 272 requirements. However, SBC's existing advanced services affiliate clearly does not satisfy Section 272's requirements, and SBC has not presented any showing that it will comply with those requirements should it be permitted to offer interLATA services in Texas. Because SBC has failed to meet its obligations under Section 272, the Commission may not grant SBC's Section 271 application but must, instead, reject SBC's application as premature.

Section 272 requires that a BOC offer offer interLATA services through a separate affiliate that "operate[s] independently" from the BOC.²⁷⁰ Toward this end, the affiliate must have separate books, records, accounts, officers, directors and employees.²⁷¹ Moreover, the affiliate must obtain its own financing, without recourse to the BOC's assets.²⁷² In addition, the BOC and the affiliate must operate on an "arm's length basis with any such transactions reduced to writing and available for public inspection."²⁷³

Under the § 272 nondiscrimination safeguard provisions, a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."²⁷⁴ Further, a BOC must account for all of its transactions with its affiliate.²⁷⁵ In addition, the BOC must comply with a biennial federal and state audit.²⁷⁶ Finally, BOCs must comply with the joint marketing provisions whereby a BOC cannot market or sell the services of its affiliate.²⁷⁷

²⁷⁰ 47 U.S.C. § 272(b)(1).

²⁷¹ 47 U.S.C. § 272(b)(2)-(3).

²⁷² 47 U.S.C. § 272(4).

²⁷³ 47 U.S.C. § 272(5).

²⁷⁴ 47 U.S.C. § 272(c)(1).

²⁷⁵ 47 U.S.C. § 272(c)(2).

²⁷⁶ 47 U.S.C. § 272(d).

²⁷⁷ 47 U.S.C. § 272(g)(1).

A. SBC's Existing SBC's Advanced Services Subsidiary is Clearly Not In Compliance With the Section 272 Requirements

The Commission approved the SBC/Ameritech merger subject to certain conditions, including a requirement that SBC offer its advanced services through a separate subsidiary. However, the Commission emphasized that the separate affiliate required as a condition of merger approval does not meet the Section 272 requirements. “[T]he structure of the separate advanced services affiliate that is required under the conditions would not be adequate for SBC/Ameritech’s provision of in-region, interLATA services following section 271 authorization.”²⁷⁸ The Commission held that it was not necessary to impose the full panoply of Section 272 requirements on SBC’s advanced services affiliate in order to counteract the public interest harms of the merger.

The separate advanced services affiliate established by SBC pursuant to the Merger Conditions fails, in several key respects, to satisfy, the more stringent criteria of Section 272. First, Section 272 requires a separate affiliate for *at least* 3 years after 271 approval while giving the FCC the option to extend that term, if necessary. Under the Merger Conditions, on the other hand, the separate affiliate obligation expires after a term certain with no opportunity for the Commission to extend that term.²⁷⁹ Second, under the Merger Conditions (but *not* under Section 272), SBC’s advanced services entity is permitted to share personnel, offices, equipment and other resources with affiliated LECs.²⁸⁰ Third, under the merger conditions (but, again *not* under Section 272(g)), SBC may enter into exclusive joint marketing arrangements with its separate

²⁷⁸ SBC/Ameritech Merger Order ¶ 357.

²⁷⁹ SBC/Ameritech Merger Conditions ¶ 12.

²⁸⁰ SBC/Ameritech Merger Conditions ¶ 3 a-d; see also Comments of Rhythms NetConnections, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC*, CC Docket No. 98-141 (July 19, 1999) (Rhythms Comments on SBC Merger Conditions).

affiliate,²⁸¹ Fourth, SBC is permitted under the Merger Conditions its affiliate preferential access to loop qualification data and certain customer data.²⁸²

B. SBC's Past and Present Behavior Strongly Suggests That It Would Not Comply With Section 272 Restrictions

In evaluating whether a BOC is likely to comply with the provisions of § 272, the Commission observed that the “past and present behavior of the BOC applicant” is the “best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272.”²⁸³ Although the merger conditions adopted less than four months ago, SBC has had an ample opportunity to demonstrate that it will avail itself of every opportunity to discriminate in favor of its “separate” affiliate. SBC has placed its affiliate on a “fast-track” negotiating process that has miraculously resulted in an interconnection agreement in 30 days, with a view toward launch of SBC’s DSL services in Texas by February 28. At the same time, Rhythms and Covad have gone through nearly two years of negotiations and arbitration and still do not have a permanent interconnection agreement. As a further portent of the discriminatory behavior which lies ahead, SBC’s affiliate is preparing to take advantage of true line sharing to offer DSL services, but SBC has not bothered to document its business arrangements for either line sharing or collocation in its interconnection agreement with its Texas affiliate. In view of these early signs of discrimination, it is particularly troubling that SBC moved so quickly to apply for 271 approval.

Even worse, as history indicates, SBC is the company that challenged sections 271-275 of the Act as an unconstitutional bill of attainder, which contributed to the Commission's

²⁸¹ *SBC/Ameritech Merger Conditions* ¶ 3a.

²⁸² Rhythms Comments on SBC Merger Conditions, CC Docket No. 98-141 at 18-22.

²⁸³ *BA-NY 271 Order* ¶ 402.

understated observation that “implementation of this congressional vision of increased telecommunications competition has . . . not proceeded swiftly or smoothly.”²⁸⁴ SBC’s actions are not those of a company that has internalized the letter or the spirit of the market opening provisions of the Telecommunications Act. In short, there is ample evidence to support a conclusion that SBC would be unlikely to voluntarily comply with the provisions of Section 272.

For these reasons, the Commission cannot find that SBC has demonstrated that it will comply with the provisions of Section 272 if its Section 271 application is granted. Before the Commission may grant SBC’s application for long-distance authority, SBC must: (1) demonstrate that it will offer interLATA services, including advanced services through an that affiliate complies fully with Section 272; and (2) demonstrate that it will not continue its pattern and practice of anticompetitive behavior toward its DSL competitors.

²⁸⁴ *BA-NY 271 Order* ¶ 4.